

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

11 JONATHAN WEISBERG, ) Case No. CV 15-08532 DDP (AGRx)  
12 individually and on behalf )  
of all similarly situated, ) **ORDER DENYING MOTION TO STAY CASE**  
13 Plaintiff, ) [Dkt. No. 27]  
14 v. )  
15 KENSINGTON PROFESSIONAL AND )  
ASSOCIATES LLC, )  
16 Defendant. )  
17 \_\_\_\_\_ )

Presently before the Court is Defendant's Motion to Stay the Case pending the outcome of the Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014), cert. granted 135 S. Ct. 1892 (2015), case in the United States Supreme Court. (Dkt. No. 27.) After considering the parties' submissions, the Court adopts the following Order.

## I. BACKGROUND

This putative class action is brought under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 et seq. (See First Am. Compl. ("FAC") ¶ 1.) Plaintiff Jonathan Weisberg alleges that in October 2012, Defendant called his cell phone "in an attempt to solicit Defendant's services to Plaintiff." (Id. ¶ 8.)

1 Defendant was offering student loan refinancing services. (Id. ¶¶  
2 8, 15.) Plaintiff alleges that he received multiple phone calls  
3 from Defendant on that single day, all with "an 'artificial or  
4 prerecorded voice' as prohibited by 47 U.S.C. § 227(b)(1)(A)." (Id.  
5 ¶ 9-11.) After Plaintiff answered the phone, the recording  
6 said that Plaintiff could speak to a live person after pressing  
7 certain keys. (Id. ¶ 12.) Plaintiff alleges he pressed the keys  
8 as prompted, and then received a call from a different number, one  
9 Plaintiff alleges is associated with Defendant. (Id. ¶ 13.)  
10 Plaintiff then asked who was calling and why, to which a  
11 representative from Defendant answered that it was Kensington  
12 Professional & Associates, a provider of student loan refinancing.  
13 (Id. ¶¶ 14-15.)

14 Plaintiff asked how Defendant received his number and  
15 Defendant's representative said that Plaintiff had "filled out a  
16 survey issued by Defendant." (Id. ¶ 16.) Plaintiff alleges he  
17 never filled out a survey or provided Defendant with his number,  
18 particularly because he does not have student loans. (Id. ¶ 17.)  
19 Plaintiff told Defendant's representative these facts and asked  
20 Defendant to cease calling his phone. (Id. ¶ 18.)

21 Plaintiff alleges that "Defendant used an 'automatic telephone  
22 dialing system' as defined by 47 U.S.C. § 227(a)(1) to place its  
23 daily calls to Plaintiff." (Id. ¶ 19.) Further, these were not  
24 emergency calls and Plaintiff was charged for incoming calls on his  
25 cell number. (Id. ¶¶ 20-21 (citing 47 U.S.C. § 227(b)(1)(A))).  
26 Plaintiff never used Defendant's services, provided his information  
27 to Defendant, or consented to receiving such calls from Defendant.  
28 (Id. ¶ 23 (citing 47 U.S.C. § 227(b)(1)(A))).

1 Plaintiff brings this case on behalf of a putative nationwide  
2 class who received such unsolicited calls on their cell phones from  
3 Defendant using an automatic telephone dialing system. (Id. ¶ 24.)  
4 Plaintiff alleges he and the putative class were harmed by  
5 Defendant's actions because

6 Defendant illegally contacted Plaintiff and Class members  
7 via their cellular telephones thereby causing Plaintiff and  
8 Class members to incur certain charges or reduced telephone  
9 time for which Plaintiff and Class members had previously  
paid by having to retrieve or administer messages left by  
Defendant during those illegal calls, and invading the  
privacy of said Plaintiff and Class members.

10 (Id. ¶ 28.)

11 Plaintiff alleges two causes of action: (1) negligent  
12 violations of the TCPA and (2) knowing or willful violations of the  
13 TCPA. (Id. ¶¶ 35-42.) Plaintiff seeks statutory damages for both  
14 causes of action. (Id.) For the negligent violations, Plaintiff  
15 seeks \$500 in statutory damages for every violation. (Id. ¶ 37  
16 (citing 47 U.S.C. § 227(b)(3)(B)).) For the knowing or willful  
17 violations, Plaintiff seeks \$1,500 in statutory damages for every  
18 violation. (Id. ¶ 41 (citing 47 U.S.C. § 227(b)(3)).) Plaintiff  
19 also seeks injunctive relief for the class under each of cause of  
action. (Id. ¶¶ 38, 42.)

21 This case is currently entering discovery, with Plaintiff  
22 serving his first set of interrogatories, requests for admission,  
23 and requests for production in early January 2016, and Defendant  
24 claims it has responded to those requests. (Mot. Stay at 4.) Now,  
25 Defendant has filed this Motion to Stay the case pending the  
26 Supreme Court's decision in Spokeo.

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1     **II. LEGAL STANDARD**

2                 "A trial court may, with propriety, find it is efficient for  
3 its own docket and the fairest course for the parties to enter a  
4 stay of an action before it, pending resolution of independent  
5 proceedings which bear upon the case. This rule applies whether  
6 the separate proceedings are judicial, administrative, or arbitral  
7 in character, and does not require that the issues in such  
8 proceedings are necessarily controlling of the action before the  
9 court." Leyva v. Certified Grocers of Cal., Inc., 593 F.2d 857,  
10 863 (9th Cir. 1979); see also Landis v. North American Co., 299  
11 U.S. 248, 254-255 (1936).

12                 Where a stay may prejudice the opposing party, the party  
13 seeking a stay must show that the denial of a stay will result in  
14 some hardship. Landis, 299 U.S. at 255. The court must weigh  
15 competing interests, including "the possible damage which may  
16 result from the granting of a stay, the hardship or inequity which  
17 a party may suffer in being required to go forward, and the orderly  
18 course of justice measured in terms of the simplifying or  
19 complicating of issues, proof, and questions of law which could be  
20 expected to result from a stay." CMAX, Inc. v. Hall, 300 F.2d 265,  
21 268 (9th Cir. 1962).

22     **III. DISCUSSION**

23                 Defendant claims that a stay is warranted in this case because  
24 the Supreme Court's decision in Spokeo will have a direct bearing  
25 on whether Plaintiff and his putative class here have Article III  
26 standing. (Mot. Stay at 10-12.) According to Defendant, Spokeo  
27 involves the question of whether Congress can confer Article III  
28 standing by authorizing a private right of action based on

1 violation of a federal statute instead of a plaintiff being  
2 required to show actual, concrete, particularized harm. (Id. at  
3 11.) Defendant argues this issue is relevant to this case because  
4 Plaintiff here has not alleged any actual harm and is only seeking  
5 statutory damages for the alleged violation of a statute. (Id.)  
6 Thus, Defendant argues that rather than put it through the  
7 prejudice of classwide discovery and potential motion practice, the  
8 Court should institute a stay in this case pending the Supreme  
9 Court's decision in Spokeo, which could be determinative of this  
10 case. (Id. at 12-15.) Further, Defendant argues that there is  
11 little to no prejudice to Plaintiff in entering a stay because the  
12 Supreme Court is projected to issue a decision in Spokeo by June  
13 2016. (Id. at 15-16.)

14 Plaintiff responds that the decision in Spokeo would not be  
15 determinative of this case because the cases involve different  
16 statutes (the TCPA here and the Fair Credit Reporting Act in  
17 Spokeo) and that statutory standing – which is at issue in Spokeo –  
18 is not at issue in this case because Plaintiff alleged actual  
19 standing. (Opp'n at 10-13.) Plaintiff argues that "the U.S.  
20 Supreme Court in Mims held that TCPA claims involve actual harm,  
21 i.e. invasion of privacy, and merely contain a statutory liquidated  
22 damages provision to specify the floor and ceiling for assessing  
23 such actual damages." (Id. at 12; see also id. at 1, 7 (citing  
24 Mims v. Arrow Fin. Servs., LLC, 132 S. Ct. 740, 745 (2012))).  
25 Further, Plaintiff claims that he would be prejudiced by a stay in  
26 this case. (Id. at 6-10.) Plaintiff claims a stay would prevent  
27 him from seeking an injunction to prevent Defendant from continuing  
28 to call potential class members, causing further harm. (Id. at 6-7)

1 & n.2.) Plaintiff also argues that a stay would delay further  
2 discovery, which could result in "lapse of time, memory of  
3 witnesses fading, and company turnover at Defendant's place of  
4 business[] with regard to material witnesses." (Id. at 7 (footnote  
5 omitted).)

6 The Court notes that there is a potential for some minimal  
7 prejudice on both parties based on granting or denying the stay.  
8 Plaintiff will not be able to continue to seek discovery or ask for  
9 an injunction if a stay is granted. If a stay is denied, Defendant  
10 will be required to respond to classwide discovery.

11 However, the key to this Motion is that any decision regarding  
12 standing in Spokeo is not likely to be applicable to this case.  
13 Plaintiff here does not allege statutory standing, or standing  
14 based on the mere alleged violation of a federal statute. Instead,  
15 Plaintiff states his theory of actual, individual, concrete injury  
16 in the FAC:

17 Defendant illegally contacted Plaintiff and Class members  
18 via their cellular telephones thereby causing Plaintiff and  
19 Class members to incur certain charges or reduced telephone  
time for which Plaintiff and Class members had previously  
paid by having to retrieve or administer messages left by  
Defendant during those illegal calls, and invading the  
privacy of said Plaintiff and Class members.

21 (FAC ¶ 28.) The invasion of privacy and the allegation that the  
22 illegal calls cost Plaintiff and the class money – financial harm –  
23 are not speculative future injuries or injuries based on the  
24 violation of rights provided in a statute. Thus, while the relief  
sought here is injunctive and statutory damages, Plaintiff does  
26 allege actual monetary damages. Seeking statutory damages where  
27 they are available is not the same as alleging statutory standing.

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1       Unlike the many cases Defendant cited in its Motion, Plaintiff  
2 has alleged sufficient actual injury to avoid a stay based on  
3 Spokeo's potential decision regarding statutory standing. (E.g.,  
4 Mot. Stay at 1-2.) Further, Plaintiff's actual injury is not  
5 similar to the injury the plaintiff in Spokeo argued he suffered.  
6 The plaintiff in Spokeo claimed that the defendant had published  
7 false information about him, impacting his ability to find  
8 employment and causing him psychic injuries. Spokeo, 742 F.3d at  
9 410. This allegation of injury was debated by the lower courts and  
10 discussed during the Supreme Court's oral argument as potentially  
11 insufficient to show actual injury for standing purposes. But in  
12 this case, Plaintiff has alleged an invasion of his privacy and  
13 monetary damages. These allegations are much more concrete and  
14 particularized than those alleged in Spokeo and have been accepted  
15 as actual injuries in other cases. Therefore, the Court declines  
16 to stay this case because any decision in Spokeo is not likely to  
17 change the standing analysis in this case.

18 **IV. CONCLUSION**

19       For all the reasons discussed above, the Court DENIES  
20 Defendant's Motion to Stay.

21  
22 IT IS SO ORDERED.  
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24 Dated: May 3, 2016  
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DEAN D. PREGERSON  
United States District Judge